> Another ad portrays tobacco executives discussing how to replace a customer base that is dying at the rate of 1,100 users a day. Some of the ads end with images of mock warning labels such as: "WARNING: The tobacco industry is not your friend."; or "WARNING: Some people will say anything to sell cigarettes."

App., *infra*, 53a-54a.

In a commercial that the district court described as "particularly striking," children are shown playing in a schoolyard, looking up while cigarettes rain down on them from the sky. The voiceover is phrased as if a tobacco industry representative were speaking:

> We have to sell cigarettes to your kids. We need half a million new smokers a year just to stay in business. So we advertise near schools, at candy counters, we lower our prices. We have to. It's nothing personal. You understand.

Id. at 54a. At the conclusion, a narrator says, "The tobacco industry: how low will they go to make a profit?" *Id.*

Another commercial features actors portraying arrogant tobacco industry executives testifying insincerely in regulatory hearings and press interviews. Although these scenes are fictitious, the commercial creates the impression that the replayed footage was taken from official tapes of congressional proceedings or press briefings. (ER 7, ¶19; ER 592 at File 06JDR13.MPG).

The State of California spends approximately $25 million annually on these advertisements. App., *infra*, 53a.

3. The District Court Decision. Petitioners brought suit, alleging that California's scheme to attack tobacco companies by using the proceeds of the surtax to fund anti-industry advertisements violated their right to be free from compelled speech under the First Amendment.[3] The parties filed cross motions in the district court. Petitioners moved for a preliminary injunction, while Respondents moved to dismiss the case for lack of standing and failure to state a claim. The court held that Petitioners had standing to pursue their claims, App., *infra*, 57a-62a, but granted Respondents' motion to dismiss. *Id.* at 98a.

The court held that the anti-industry advertisements were not compelled speech. Instead, it held that the ads constituted "government speech" because they are attributed to the California Department of Health Services, and because government officials had "actual responsibility" for the ads. *Id.* at 76a-77a. The court regarded "compelled speech" and "government speech" as mutually-exclusive categories. *Id.* at 74a-77a.

The trial court stated that the "government speech doctrine teaches that the remedy for [Petitioner's] assertion of harm is 'political rather than judicial,'" but it observed that "the path taken by Proposition 99 turns the democratic process on its head. Rather than citizens trying to persuade the government as to a proper course of its conduct, the government tries to dissuade the public from engaging in conduct it apparently does not have the political will to either regulate or ban." *Id.* at 80a & n.21.

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[3] Petitioners asserted additional claims that are not before this Court, including: (1) a compelled speech claim under the California Constitution; (2) a claim that the ads violate Petitioners' Due Process and Jury Trial rights under the Seventh and Fourteenth Amendments; and (3) a claim that the ads violate the Seventh Amendment. App. *infra*, 56a-57a.

The court nevertheless concluded that "California's decision to combat the problem [of tobacco] through a strategy of education and counter-advertising, as opposed to outright prohibition, is, under present doctrine, a political and practical judgment that the state is free to make." *Id.* at 85a-87a.

4. The Ninth Circuit's Decision. The Ninth Circuit affirmed in a split decision. The court recognized the government's obligation not to compel taxpayers to fund private speech with which they disagree, but found that where "the government acts as both a taxing authority and as a speaker," "it may espouse views that directly contradict those of taxpayers without interfering with taxpayers' freedom of expression," even if the speech vilifies the very taxpayers who are the target of the excise tax that funds the speech. App., *infra*, 14a-15a.

The panel majority held that "[a] mere link between an excise tax and a government-sponsored advertising campaign, absent a claim that either the tax or the advertising is unconstitutional, does not violate the First Amendment." App., *infra*, 8a. Thus, under the Ninth Circuit's reasoning, so long as the government enacts a permissible tax and uses it to engage in permissible speech, no First Amendment claim arises.

Judge Trott dissented, characterizing California's tax-and-smear scheme as "an exceptional case of government intrusion on the right not to be compelled to finance speech." *Id.* at 43a. Judge Trott stated that the statute was "designed to force one particularly disfavored group to fund speech directly undermining that group's reputation," which "offends the very essence of the First Amendment." *Id.*

Petitioners sought rehearing en banc. The Ninth Circuit stayed the petition pending this Court's decision in *Johanns* v. *Livestock Marketing Association*, 125 S. Ct.

2055 (2005). After *Johanns* was decided, the Ninth Circuit denied the petition for rehearing, and the panel majority and the dissenting judge each amended their opinions to address *Johanns*. App., *infra*, 29a-30a (postscript to majority opinion); 44a-47a (postscript to dissent).

REASONS FOR GRANTING THE WRIT

I. This Case Warrants Further Review In Light Of *Johanns*.

This Court addressed the "government speech" doctrine last Term in *Johanns* v. *Livestock Marketing Association*, 125 S. Ct. 2055 (2005). In *Johanns*, cattle ranchers challenged a "checkoff" program that imposed a $1-per-head assessment and used some of the proceeds to fund promotional advertisements supporting the beef industry. The Court held that the pro-industry advertisements were the government's own speech, and thus did not violate the First Amendment. Although both *Johanns* and this case involve the government speech doctrine, *Johanns* does not control, and indeed it indicates that this case warrants further review. That is so for three reasons.

First, *Johanns* presented a facial challenge to a checkoff program that funded generic advertising favoring those who were subject to the checkoff. The primary question was whether the advertising was "government speech" at all. This case, in contrast, presents an as-applied challenge to the use of a tax on a disfavored group to fund an ad campaign directly attacking that group. *Second*, the advertisements funded by the surtax "tar" petitioners "with the content" of the ads and "'coercively associate' and intentionally smear the appellants—all of them—with an 'unwanted message.'" App., *infra*, 46a. *Third*, unlike the program in *Johanns*, California's tax-and-smear campaign is not subject to adequate political safeguards.

A. *Johanns* Resolved A Different Question.

The primary question in *Johanns* was whether the beef checkoff program constituted "government speech." The beef producers challenging the checkoff argued that the beef campaign was not "government speech" because the content of the campaign was controlled by a nongovernment committee. *Johanns*, 125 S. Ct. at 2062. The Court rejected this argument, holding that the message "is effectively controlled by the Federal Government itself." *Id.* The argument "that the beef program does not qualify as 'government speech' because it is funded by a targeted assessment" was also rejected. *Id.* at 2063. Thus, for purposes of a "compelled-subsidy" case, it does not matter "whether the funds for the promotions are raised by general taxes or through a targeted assessment." *Id.*

This case is different. Petitioners do not deny that the State controls the content of the advertising campaign. Nor do they assert that the source of funding makes the ad campaign any less the government's speech. Instead, Petitioners challenge the scope of the "government speech" doctrine. Petitioners ask the Court to determine whether the doctrine gives the State carte blanche to fund advertising campaigns directed against unpopular minority groups with taxes imposed exclusively on those very groups.

As Judge Trott's dissent stated:

> Today the target of government dislike is smoking, but tomorrow it will be something else, such as Alabama's imposition, in its the Woman's Right to Know Act, of a fee applied to abortion providers for the production by the state of pro-childbirth materials which the providers did not wish to endorse, much less purchase. *See* Ala.

> Code §§ 26-23A-1 to 13; *Summit Medical Center of Alabama, Inc.* v. *Riley*, 284 F. Supp. 2d 1350 (M.D. Alabama 2003). Who knows whose disfavored ox or whose industry or business or lifestyle will be the next to be fatally gored in this manner by a well-intentioned government.

App., *infra*, 32a.

Moreover, *Johanns* decided a facial challenge to the beef checkoff program, focusing on whether entities that pay a targeted assessment have a "right not to fund government speech." 125 S. Ct. at 2064, n.7. Here, Petitioners challenge the California surtax only as applied to the State's decision to use the proceeds of the surtax for anti-industry advertisements.

B. The Advertisements Impermissibly Associate Petitioners With Their Content.

In *Johanns*, the Court recognized that an as-applied challenge to the beef checkoff program might lie if "individual beef advertisements were attributed to" the beef producers. 125 S. Ct. at 2065. The Court stated that there was insufficient evidence in the record to determine whether any beef producers would be "tarred with the content" of the challenged ads. *Id.* at 2065-66. In a concurrence, Justice Thomas agreed that "respondents would have a valid as-applied First Amendment challenge" if the advertisements "associated" their message "with either the individual or organization respondents." *Id.* at 2066 (Thomas, J., concurring). The concurrence goes on to state: "The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them." *Id.* The State did exactly that here.

California's ads attribute an unwanted message to tobacco companies even though they do not state that the companies are paying the bill. They do so essentially by putting "words in the mouth" of tobacco companies and company executives. The State hired actors to play tobacco company executives and sales personnel. The ads show tobacco executives lying to Congress. They show executives sitting around a conference table discussing how to encourage smoking and mocking health concerns. The ads use voiceovers that are presented as statements by the industry, such as "We have to sell cigarettes to your kids." It is not surprising that the State candidly describes its ads as "propaganda," since one of the classic techniques of propaganda is to ascribe distasteful views or alleged quotations to one's opponent, to cause the public to associate the opponent with the negative message. The First Amendment prevents the government from requiring the target of such a propaganda campaign – here, domestic companies engaged in a lawful business – to fund the campaign.[4]

Judge Trott's postscript to his dissent following the *Johanns* decision correctly concludes that this case presents exactly the "tarring" and "coercive association" contemplated by the majority and concurring opinions in *Johanns*. App., *infra*, 46a. As Judge Trott stated, if the challenged advertisements do not "'tar all in the industry' required to pay for the ad, and if this language does not 'coercively associate' and intentionally smear the

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[4] The panel majority dismissed one "particularly striking" ad that puts words directly into the mouths of tobacco company executives on the ground that "[n]o reasonable viewer could overlook the satirical tenor of this ad." App., *infra*, 30a. At the very least, as Judge Trott correctly noted, these facts "should be submitted–as suggested by the Supreme Court–to a factfinder," App., *infra*, 46a.

[Petitioners]—all of them—with an 'unwanted message' to which they object, it is hard to know what does." *Id.*

C. The Advertisements Are Not Subject To Effective Political Safeguards

In *Johanns*, the Court was careful to state that the targeted nature of a tax to fund government speech does not establish a First Amendment claim where there are political safeguards that are "more than adequate to set them apart from private messages." 125 S. Ct. at 2064. Although the dissent argued that the checkoff program was not subject to sufficient political accountability, it agreed that "if government relies on the government-speech doctrine to compel specific groups to fund speech with targeted taxes, it must make itself politically accountable." *Id.* at 2069 (Souter, J., dissenting). The dissent stated that "[t]he adequacy of the democratic process to render the subsidization of government speech tolerable is, naturally, tied to the character of the subsidy." *Id.* at 2071. When an assessment is targeted, the "First Amendment affront [is] more galling," and "greater care is required." *Id.* at 2071-72. In addition, "the intensity of the provocation experienced by the targeted group" justifies greater scrutiny. *Id.* at 2072.

The beef checkoff program was "subject to a referendum among beef producers," that was passed by "a large majority." *Id.* at 2059. Moreover, the Secretary of Agriculture could call for another referendum upon demand of a "'representative group' comprising 10 percent of cattle producers." *Id.* at 2064 n.6. Thus, the cattle producers who were the "target" of the checkoff program collectively approved the program, which generally funded speech that was favorable to the producers.[5]

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[5] The objectors to the beef checkoff in *Johanns* disagreed with the generic pro-beef messages because they believed that (...continued)

The same is not true here. Petitioners had no opportunity to approve the surtax or the advertisements funded by the tax. Moreover, the advertisements are not, as was the case in *Johanns*, generic messages that generally favor Petitioners. Indeed, the expressly stated purpose of the ads is to destroy the industry by making it and its product even more unpopular than they might otherwise be.[6] As a result, these ads are a particularly "intens[e]" form of "provocation" and thus a "more galling" affront to the First Amendment. *Id.* at 2071-72.

Unlike *Johanns*, the government here has avoided political safeguards by targeting a small and particularly disfavored minority with a message of condemnation. As the district court put it, "the path taken by Proposition 99 turns the democratic process on its head. Rather than citizens trying to persuade the government as to a proper course of its conduct, the government tries to dissuade the public from engaging in conduct it apparently does not have the political will to either regulate or ban." App., *infra*, 80a & n.21.

II. The First Amendment Limits Government Power To Tax A Disfavored Minority Group For The Purpose Of Funding Government Speech Attacking The Very Group That Is Subject To The Tax.

The Court has "sustained First Amendment challenges to allegedly compelled expression in two categories of cases: true 'compelled speech' cases, in

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certain forms of beef are superior. 125 S. Ct. at 2068 (Souter, J., dissenting).

[6] This is so even though the state concededly adopted this strategy because it believed consumers were already aware of the health risks of smoking, so health information messages were not useful.

which an individual is obliged personally to express a message he disagrees with, imposed by the government; and 'compelled subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity." *Johanns*, 125 S. Ct. at 2060. Before *Johanns*, the Court had not "considered the First Amendment consequences of government-compelled subsidy of the government's own speech." *Id.* While *Johanns* rejected such a claim, as explained above, the Court's decision in *Johanns* does not control this case. Most fundamentally, in this case the "purpose of the coerced speech is deliberately destructive of those forced to pay for it—not so in *Johanns*." App., *infra*, 47a (Trott, J. dissenting). Thus, under the compelled speech doctrine, a State should be found to violate the First Amendment when it imposes a targeted tax to fund government speech directed against the targets of the tax.

The panel majority's contrary decision mistakenly concludes that, so long as neither the challenged advertisements nor the tax itself violate the First Amendment when viewed in isolation, the combination of the tax and the advertisements must also be constitutional.[7] The Ninth Circuit began its discussion of the First Amendment issues in this case by quoting Chief Justice Marshall's famous statement for the Court in

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[7] This Court rejected a similar argument under the Commerce Clause in *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994). There, the State of Massachusetts imposed a tax on milk sold in Massachusetts and used the revenues from the tax to subsidize in-state milk producers. The State argued that the tax was constitutional when viewed in isolation, and the subsidy was also constitutional when viewed in isolation, and therefore the combination of the tax and subsidy must also be constitutional. This Court disagreed, and looked instead to the combined effect of both government measures.

McCulloch v. *Maryland*, that "the power to tax involves the power to destroy." App., *infra*, 7a, (quoting 17 U.S. (4 Wheat) 316, 431 (1819)). The tax at issue here involves an especially pernicious use of the power to tax. Where a State taxes a disfavored small group in order to fund an advertising campaign attacking that very group, it strikes two blows at once. The State not only compels a disfavored group to devote resources to speech attacking itself, but it deprives the disfavored group of those same resources to advance the group's own message.

Immediately after quoting Chief Justice Marshall, the Ninth Circuit stated that "this case involves neither an invalid exercise of the government's power to tax nor a claim that they have been destroyed by the government's speech." *Id.* But the First Amendment is not so limited. As Judge Trott observed, where the government forces a taxpayer to fund a campaign for its own destruction, it "offends the very essence of the First Amendment." App., *infra*, 43a. Judge Trott cited Chief Judge Wilkinson's statement, in *Sons of Confederate Veterans* v. *Commissioner of the Virginia Department of Motor Vehicles*, that "[t]he First Amendment was not written for the vast majority. . . . It belongs to the minority of one." 305 F.3d 241, 242 (4th Cir. 2002) (Wilkinson, C.J., concurring in denial of rehearing en banc). California's program is thus "an exceptional case of government intrusion on the right not to be compelled to finance speech." *Id.* at 43a.

While minor disagreements over the content of speech coercively funded by targeted assessments are sufficient to trigger constitutional scrutiny, *e.g.*, *United States* v. *United Foods*, 533 U.S. 405, 411 (2001), "the extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will effect." *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991). Here, the extent of disagreement is truly

extraordinary, and therefore the degree of impingement upon free expression is very large.

In addition, the impact of speech is increased when the government places its imprimatur on the message presented to the public, *See Miller* v. *California Comm'n on the Status of Women*, 151 Cal. App. 3d 693, 702 (1984) ("That the imprimatur of government has conferred an advantage upon the commissioners is undeniable"). Where, as here, the State combines its powerful voice with its coercive power to tax, it distorts the marketplace of ideas.

III. The Ninth Circuit's Decision Conflicts With Decisions Of Other Courts Recognizing First Amendment Limits On Government Speech.

Petitioners claim that the nexus between the targeted tax and California's program vilifying the taxpayers burdens the taxpayers' ability to express their views. The Ninth Circuit categorically rejected this claim, holding that a government program cannot constitute a "restriction on [parties'] ability to express their views" unless it engages in either unconstitutional taxation or unconstitutional speech. App., *infra*, 24a.

The Ninth Circuit's decision conflicts with decisions of two other circuits recognizing additional First Amendment limitations on government speech. In *Warner Cable Communications* v. *City of Niceville*, a cable company challenged a city government's decision to implement a city-owned cable system. 911 F.2d 634 (11th Cir. 1990). The Eleventh Circuit noted that the government may participate in the marketplace of ideas without offending the First Amendment, but recognized that in some cases of government speech, "First Amendment concerns would arise." In particular, the court recognized that there is a concern where "government speech becom[es] so dominant as to 'drown out' the voice of private speakers." *Id.* at 638. The court

stated that "the government may not speak so loudly as to make it impossible for other speakers to be heard by their audience." *Id.*

The court continued:

> For instance, if a city government builds a better soapbox, equipped with spotlights and powerful loudspeakers, next to the longstanding antique soapbox in the city square, and if government speakers dominate the new soapbox, then speakers on the first soapbox do not truly have the opportunity to communicate their views even to those who might wish to hear them. The city would indeed be 'drowning out' the voice of the private speakers.

Id. at 638. The court went on to decide that the facts of the case did not justify the cable company's concern that its speech would be drowned out by the government-operated cable system. *Id.*

The Sixth Circuit has similarly held that "the government may not engage in speech suppression through its own speech." *AMSAT Cable* v. *Cablevision Ltd. P'ship*, 6 F.3d 867, 872 (2d Cir. 1993). In *AMSAT*, the court held that a satellite television provider's freedom of speech is not abridged by an ordinance requiring it to give access to competing cable providers to apartment complexes exclusively serviced by the satellite company. *Id.* at 871-872. The court cited with approval the *Warner Cable* decision that "'the government may not speak so loudly as to make it impossible for other speakers to be heard by their audience,'" but ultimately held that "[n]o such suppression [had] occurred." *Id.* at 872 (quoting *Warner Cable*, 911 F.2d at 638).

The Ninth Circuit's opinion places no First Amendment limits on the power of government to impose a targeted tax on an unpopular minority to fund speech

directed against that minority. The court stated: "In short, by being required to contribute to DHS's advertisements, the tobacco companies have not been deprived of their freedom of expression." App., *infra*, 20a. The Ninth Circuit's decision does not recognize that such a targeted tax may compromise the taxpayer's ability to advance its own message. To the contrary, the decision flatly denies the possibility, stating that Petitioners' challenge does not constitute a "restriction on their ability to express their views." *Id.* at 24a.

In fact, the Ninth Circuit's opinion allows governments to diminish or drown out the speech of an unpopular minority at will, simply by taxing away some or all of the resources of the unpopular minority, and using those resources to fund government speech that is antithetical to the views of the minority. Because the Ninth Circuit's decision holds that there is no limit to government's ability to engage in such maneuvers, so long as the targeted tax and the targeted government speech are constitutionally valid when considered in isolation, its decision conflicts with the decisions of the Eleventh Circuit in *Warner Cable* and the Sixth Circuit in *AMSAT*.

The Ninth Circuit acknowledged the Eleventh Circuit's decision, but dismissed it as inapplicable to this case. App., *infra*, 24a-25a. According to the Ninth Circuit, *Warner Cable* is inapposite because Petitioners "do not argue that the government's speech itself is constitutionally impermissible; nor do they argue that the government has burdened their First Amendment rights through the exercise of its power to tax." App., *infra*, 24a. The court continued: "Were the tobacco companies challenging a California restriction on their ability to express their views, our analysis would be different." *Id.*

The Ninth Circuit dismissal of *Warner Cable* is unjustified. Under *Warner Cable*, California's tax-and-advertise scheme would be impermissible because it allows government to "drown out" private speech by

funding government speech attacking an unpopular industry with revenues extracted from that very industry. And contrary to *AMSAT*, the Ninth Circuit's decision allows the government to "engage in speech suppression through its own speech." 6 F.3d at 872.

The Ninth Circuit's decision also ignores the significant limitations on Petitioners' ability to respond to California's negative advertisements. Although Petitioners have significant resources, they are subject to extensive restrictions on their advertising activities, through federal and state laws and the Master Settlement Agreement with the National Association of Attorneys General. *See, e.g., Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 541 (2001) ("Congress has crafted a comprehensive federal scheme governing the advertising and promotion of cigarettes."); 15 U.S.C. § 1335 ("After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."); Tobacco Master Settlement Agreement, available at http://www.naag.org/backpages/naag/tobacco/msa (visited Dec. 29, 2005). Moreover, any attempt by Petitioners to counter the State's advertising would very likely subject the companies to potential lawsuits under California law based on that very attempt. *See Kasky* v. *Nike*, 45 P.3d 243, 261 (Cal. 2002) (holding that Nike's public rebuttal statements about working conditions in its factories are commercial speech). This Court granted certiorari in *Kasky*, and although the writ was later dismissed, three Justices dissented from that decision based in part on the "chilling effect" of the relevant California law. Given these restrictions, California's imposition of a tax to fund

television ads maligning the taxpayers is particularly destructive of First Amendment values.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] The Ninth Circuit's decision also conflicts with the decision in *Summit Medical Center of Alabama, Inc.* v. *Riley*, 284 F. Supp. 2d 1350 (M.D. Ala. 2003). *Summit* involved a challenge by an abortion provider to a state law requiring abortion providers to purchase and distribute pamphlets published by the State that expressed a view of abortion objectionable to the provider. The *Summit* court initially found that the providers could not be required to pay for these pamphlets, even though the State could require the providers to distribute them. *Summit Med. Ctr. of Ala., Inc.* v. *Riley*, 274 F. Supp. 2d 1262, 1277 (M.D. Ala. 2003).

In its initial decision, the court did not mention that the pamphlets were published by the State, and were therefore "government speech." Following the district court's decision in this case, the *Summit* court expressly considered the government speech doctrine and reaffirmed its ruling. The court held that "the government speech doctrine cannot serve as a shield against all First Amendment challenges." 284 F. Supp. 2d at 1359. The court held that "the State's interest in requiring abortion providers to pay for its informational materials cannot justify the significant infringement on the Plaintiffs' First Amendment rights." *Id.* at 1362.

Respectfully submitted,

M. KEVIN UNDERHILL
Shook, Hardy & Bacon LLP
333 Bush Street, Suite 600
San Francisco, CA 94104
(415) 544-1900

H. JOSEPH ESCHER III*
Dechert LLP
One Market
Steuart Tower, Suite 2500
San Francisco, CA 94105
(415) 262-4500

January 6, 2006

**Counsel of Record*

No. 05-

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY; LORILLARD TOBACCO COMPANY; R.J. REYNOLDS SMOKE SHOP, INC.,

Petitioners,

v.

SANDRA SHEWRY, DIRECTORY OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DILEEP G. BAL, ACTING CHIEF OF THE TOBACCO CONTROL SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

M. KEVIN UNDERHILL
Shook, Hardy & Bacon LLP
333 Bush Street, Suite 600
San Francisco, CA 94104
(415) 544-1900

H. JOSEPH ESCHER III*
Dechert LLP
One Market
Steuart Tower, Suite 2500
San Francisco, CA 94105
(415) 262-4500

**Counsel of Record*

January 6, 2006

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No. 03-16535

R.J. REYNOLDS TOBACCO COMPANY; LORILLARD TOBACCO COMPANY; R. J. REYNOLDS SMOKE SHOP, INC., *Plaintiffs-Appellants*,

v.

SANDRA SHEWRY, Director of the California Department of Health Services; DILEEP G. BAL, Acting Chief of the Tobacco Control Section of the California Department of Health Services; STATE OF CALIFORNIA, *Defendants-Appellees*.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

May 10, 2004, Argued and Submitted,
San Francisco, California

September 9, 2005, Amended

Before: Betty Binns Fletcher, Stephen Trott and Raymond C. Fisher, Circuit Judges.

FISHER, Circuit Judge:

We deal here with a novel First Amendment claim. The appellants, three tobacco companies, claim that California violated their First Amendment rights by imposing a surtax on cigarettes and then using some of the proceeds of that surtax to pay for advertisements that criticize the tobacco industry. The tobacco companies argue that this is a case of compelled subsidization of speech prohibited by the First Amendment, analogous to *United States* v. *United Foods, Inc.*, 533 U.S. 405, 150 L.

Ed. 2d 438, 121 S. Ct. 2334 (2001). California counters that the advertisements are government speech entirely immune from First Amendment attack.

The tobacco companies concede that (1) the imposition of the tax itself is not unconstitutional and (2) the message produced by the government's advertisements creates no First Amendment problem apart from its method of funding. Rather, they argue for an independent First Amendment violation based on the close nexus between the government advertising and the excise tax that funds it. We reject this argument as unsupported by the Constitution and Supreme Court precedent, and as so unlimited in principle as to threaten a wide range of legitimate government activity. We also reject the tobacco companies' claim that the advertisements violated their rights under the Seventh Amendment or the Due Process Clause. We thus affirm the district court.[1]

FACTUAL AND PROCEDURAL BACKGROUND[2]

In 1988, California voters approved Proposition 99, a statewide ballot initiative also known as the "Tobacco Tax and Health Protection Act of 1988." Cal. Rev. & Tax Code §§ 30121-30130. The Act imposes the Cigarette and Tobacco Products Surtax ("the surtax"), a 25-cent per-pack surtax on all wholesale cigarette sales in California.

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[1] We note that the district court issued a particularly thoughtful, thorough and comprehensive opinion in this case, upon which we have substantially relied even though we do not adopt all of its reasoning.

[2] Because this case comes before us on the state's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we accept as true all allegations in the tobacco companies' complaint.

The revenue generated by the surtax is placed in the "Cigarette and Tobacco Products Surtax Fund." Twenty percent of taxes in the surtax fund is allocated to a "Health Education Account," funds from which are only "available for appropriation for programs for the prevention and reduction of tobacco use, primarily among children, through school and community health education programs." *Id.*, § 30122(b)(1).

In order to implement Proposition 99, the California Legislature directed the California Department of Health Services ("DHS") to establish "a program on tobacco use and health to reduce tobacco use in California by conducting health education interventions and behavior change programs at the state level, in the community, and other nonschool settings." Cal. Health & Safety Code § 104375(a). As part of this program, called the "Tobacco Control Program," the DHS is required to develop a media campaign designed to raise public awareness of the deleterious effects of smoking and to effect a reduction in tobacco use. *Id.*, §§ 104375(b), (c), (e)(1) & (j); 104385(a); 104400. The Tobacco Control Program is funded entirely with money from the Health Education Account—and thus, ultimately, exclusively from the proceeds of the surtax.

This case concerns certain advertisements the DHS produced as part of its Tobacco Control Program. According to the tobacco companies, the DHS concluded soon after the establishment of the Tobacco Control Program that a media campaign focused solely on presenting the health risks of tobacco use would be of limited utility in reducing the incidence of smoking in California, because people tend to "tune out" advertising that simply explains the health risks involved with tobacco use. Thus, the DHS concluded that, in order to carry out its mandate to encourage Californians to modify and reduce their use of tobacco, it would be necessary to launch a campaign to "denormalize" smoking, by creating

a climate in which smoking would seem less desirable and less socially acceptable.

One method used by the DHS in this campaign has been to portray the tobacco industry itself as deceptive and as an enemy of the public health, or, in the companies' words, to attack not "the desirability of a product but . . . the moral character of [the] industry, accusing it of hypocrisy, cynicism and duplicity." The district court described these advertisements as follows:

> A recent round of television commercials features an actor playing a public relations executive for the fictional cigarette brand "Hampton," detailing for viewers his unseemly methods for getting people to start smoking. The ads end with the tagline, "Do You Smell Smoke?," implicitly referencing both cigarette smoke and a smoke-and-mirrors marketing strategy. Another ad portrays tobacco executives discussing how to replace a customer base that is dying at the rate of 1,100 users a day. Some of the ads end with images of mock warning labels such as: "WARNING: The tobacco industry is not your friend."; or "WARNING: Some people will say anything to sell cigarettes." Several spots suggest that tobacco companies aggressively market to children. In one particularly striking television ad entitled "Rain," children in a schoolyard are shown looking up while cigarettes rain down on them from the sky. A voice-over states "We have to sell cigarettes to your kids. We need half a million new smokers a year just to stay in business. So we advertise near schools, at candy counters. We lower our prices. We have to. It's nothing personal. You

> understand." At the conclusion, the narrator says, "The tobacco industry: how low will they go to make a profit?"

R.J. Reynolds v. *Bonta*, 272 F. Supp. 2d 1085, 1089 (2003). The district court also noted that each of the challenged advertisements is "identified as 'Sponsored by the California Department of Health Services.' " *Id.* The tobacco companies do not claim that these advertisements contain any affirmatively false statements.

That California itself is interested in the outcome of the campaign is made clear by the Legislature's finding that "smoking is the single most important source of preventable disease and premature death in California" and that preventing tobacco use by children and young adults is the "highest priority in disease prevention for the state of California." Cal. Health & Safety Code § 104350(a). The district court explained that "there is substantial evidence, including published medical studies, indicating that the Proposition 99 programs, and the media campaign in particular, have been successful in achieving their goals." *Bonta*, 272 F. Supp. 2d at 1088 n.5 (noting the following articles describing the success of California's campaign in reducing the incidence of smoking: C. Fichtenberg and S. Glantz, *Association of the California Tobacco Control Program with Declines in Cigarette Consumption and Mortality from Heart Disease*, NEW ENG. J. MED. 343:24, 1772-1777 (2000); M. Siegel, *Mass Media Antismoking Campaigns: A Powerful Tool for Health Promotion*, ANNALS OF INTERNAL MED., 129:2, 128-132 (1998); J.P. Pierce, et al., *Has the California Tobacco Control Program Reduced Smoking?*, JAMA 280:10, 893-899 (1998)).

The appellant tobacco companies here are R.J. Reynolds Tobacco Company; its wholly owned subsidiary R.J. Reynolds Smoke Shop, Inc.; and Lorillard Tobacco Company. R.J. Reynolds pays the surtax through sales from its smoke shop subsidiary; Lorillard pays the surtax

in connection with certain of its research and marketing activities in California. These companies are not the most important sources of revenue for the surtax, however. Because the surtax is imposed on distributors of cigarettes, most surtax payments are made not by cigarette manufacturers themselves, but by cigarette wholesalers. Nonetheless, because the tobacco companies sell or provide small quantities of cigarettes directly to smokers in California, they have paid and will in the future be required to pay the surtax. The tobacco companies here paid approximately $ 14,000 in surtax funds, thus contributing approximately $ 2,800 of the $ 25 million spent on the challenged ads. *Bonta*, 272 F. Supp. 2d at 1090.

The tobacco companies brought five causes of action against the state defendants ("the state" or "California") to the district court, seeking both injunctive and declaratory relief. They argued that the use of the surtax to fund the "anti-industry" advertisements violated the First Amendment, that the advertisements improperly stigmatized them in violation of the Fourteenth Amendment, that the advertisements interfered with their right to a jury trial under the Seventh and Fourteenth Amendments and that the advertisements violated the California Constitution.[3] The state moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court dismissed with prejudice all of the companies' federal constitutional claims, and the companies timely appealed.

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[3] This state law claim is not before us.

DISCUSSION

I. First Amendment

We begin by addressing the scope of the First Amendment issue. The tobacco companies do not raise a First Amendment challenge to California's right to sponsor "anti-industry" advertisements. As their brief to this court puts it, "if the broadcasts were funded by general taxes rather than by a tax imposed exclusively on the tobacco industry, the anti-industry ads would raise no First Amendment issue." Nor do the companies argue that the surtax itself has interfered with their constitutional rights. *See, e.g., Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 227-29, 95 L. Ed. 2d 209, 107 S. Ct. 1722 (1987) (invalidating a statute that granted a tax exemption for religious, professional, trade and sports journals that did not apply to other journals); *Minneapolis Star & Tribune* v. *Minn. Comm'r of Revenue*, 460 U.S. 575, 591-93, 75 L. Ed. 2d 295, 103 S. Ct. 1365 (1983) (invalidating a special tax on the press limited to only a few newspapers). Their claim is specific: they argue that using the money raised from an excise tax that targets the tobacco industry to pay for advertising that denigrates the industry violates their constitutional rights.

Before discussing the precedent upon which the tobacco companies rely, we note that this is a novel argument. At issue is neither the government's power to speak nor the government's power to tax. Chief Justice John Marshall famously stated that "the power to tax involves the power to destroy." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431, 4 L. Ed. 579 (1819). According to the tobacco companies, however, this case involves neither an invalid exercise of the government's power to tax nor a claim that they have been destroyed by the government's speech. Rather, the companies claim a constitutional violation in the link between the excise tax and the government speech to which they object. By

suggesting that certain taxpayers should be able to object to government speech whenever an excise tax is used to fund a message that particularly affects the group that pays the tax, the tobacco companies' argument would implicate a range of other programs. As we shall explain, we reject the "nexus" argument as applied to excise taxation. A mere link between an excise tax and a government-sponsored advertising campaign, absent a claim that either the tax or the advertising is unconstitutional, does not violate the First Amendment.

A. *United Foods*, the Compelled Speech Doctrine and Taxation

The tobacco companies rely in large part upon one case: *United States* v. *United Foods, Inc.*, 533 U.S. 405, 150 L. Ed. 2d 438, 121 S. Ct. 2334 (2001).[4] We do not agree that *United Foods* controls. Rather, we conclude that the compelled speech cases, of which *United Foods* is one, do not apply where an excise tax is used to produce a message that indisputably comes from the government itself.

In *United Foods*, the Court considered a federal program created by the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101 *et seq.* As the Court described the program,

> The Act authorizes the Secretary of Agriculture to establish a Mushroom

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[4] The Supreme Court has recently granted certiorari in *Livestock Mktg. Ass'n* v. *USDA*, 335 F.3d 711 (8th Cir. 2003), cert. granted sub nom. *Veneman* v. *Livestock Mktg. Ass'n*, 541 U.S. 1062, 158 L. Ed. 2d 962, 124 S. Ct. 2389, 72 U.S.L.W. 3725 (U.S. May 24, 2004) (No. 03-1164) and *Nebraska Cattlemen, Inc.* v. *Livestock Mktg. Ass'n*, 541 U.S. 1062, 158 L. Ed. 2d 962, 124 S. Ct. 2390, 72 U.S.L.W. 3725 (U.S. May 24, 2004), involving the interaction between the compelled speech and government speech doctrines.

> Council to pursue the statute's goals. Mushroom producers and importers, as defined by the statute, submit nominations from among their group to the Secretary, who then designates the Council membership. To fund its programs, the Act allows the Council to impose mandatory assessments upon handlers of fresh mushrooms in an amount not to exceed one cent per pound of mushrooms produced or imported. The assessments can be used for "projects of mushroom promotion, research, consumer information, and industry information." It is undisputed, though, that most moneys raised by the assessments are spent for generic advertising to promote mushroom sales.

533 U.S at 408 (citations omitted). The petitioner in that case was a mushroom producer that refused to pay its mandatory assessment. The Supreme Court described the question presented as "whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." 533 U.S. at 410. Under the facts of *United Foods*, the Supreme Court held that the answer to that question was "no." The Court held that by requiring the mushroom producer to contribute to generic advertisements for mushroom sales to which it objected, the government had put "First Amendment values . . . at serious risk" by "compelling a discrete group of citizens [] to pay special subsidies for speech on the side that [the government] favors." *Id.* at 411.

Read broadly, and taken in isolation, this language might plausibly suggest that the tobacco companies have the right to object to the advertisements at issue here because they have paid "special subsidies" for the

advertisements in the form of a tax that disproportionately affects them. Yet *United Foods* also makes clear that not every case in which the government mandates support for speech from a particular group necessarily creates a First Amendment violation. Most importantly, the Court specifically declined to address whether the same First Amendment analysis would apply to cases in which the speech produced was "government speech" that derived from the state itself and not the Mushroom Council. *See id.* at 416 ("The Government argues the advertising here is government speech, and so immune from the scrutiny we would otherwise apply. As the government admits . . . however, this argument was not raised or addressed in the Court of Appeals.") (citations omitted). *United Foods* also carefully relied on the teaching of previous compelled speech cases to reach its holding about the contributions to the Mushroom Council. *Id.* In order to understand the impact of *United Foods*, therefore, we examine the origins and the purpose of the compelled speech doctrine.

It has long been established that the First Amendment prohibits the government from compelling citizens to express beliefs that they do not hold. "The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977) (forbidding a state government from compelling motorists to display the message "Live Free or Die" on their license plates); *see also West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943) (preventing a state government from forcing children to salute the American flag when the children's religious beliefs forbade such behavior). These cases are not directly applicable here because there is no claim that the tobacco companies have been forced into expressing any position.